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Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 767

CHICAGO CITY BANK & TRUST COMPANY, a corporation, as Trustee under Trust No. 2739, and JULES J. REINGOLD,
Petitioners,

VS.

THE CITY OF HIGHLAND PARK, a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Chicago City Bank and Trust Company, a corporation, as Trustee under Trust No. 2739, and Jules J. Reingold, petitioners herein, pray that a writ of certiorari issue to review the final judgment of the Supreme Court of Illinois entered September 25, 1956 (R. 20). A timely petition for rehearing was filed on October 10, 1956 and was denied on November 19, 1956 (R. 23).

Petitioners, as plaintiffs below, had filed suit for a declaratory judgment to have the zoning ordinance of respondent declared void in so far as it was interpreted to restrict them in their efforts to utilize the fourth floor

of their existing building by creating seven apartments out of presently vacant space. The trial Court held for the petitioners but was reversed by the Illinois Supreme Court.

Opinion below.

The opinion of the Supreme Court of Illinois is included in the Transcript of the Record (R. 14); is set forth in full in the Appendix hereto, pp. 25-33; and is officially reported in 9 Ill. (2) 364, 137 N.E. 2d 835.

Statement of grounds on which this Court's jurisdiction is invoked.

Subdivision (3) of Section 1257 of Title 28, Judiciary and Judicial Procedure, is relied upon as giving jurisdiction to the Supreme Court of the United States to review the final judgment of the Supreme Court of Illinois is this cause. It reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929." (U. S. C. A., Title 28, Sec. 1257 (3)).

A municipal ordinance has been held to be a "State statute" within former Section 344 of Title 28, from which the foregoing provision is derived. (*Jamison* v. *Texas,* 318 U.S. 413, 414; 87 L. ed. 869; *King Mfg. Co.* v. *Augusta,* 277 U.S. 100, 102-114; 72 L. ed. 801).

Questions presented for review.

(1) Whether the exercise of the legislative power of a municipality to zone is not violative of the constitutional rights of the owner under the 5th and 14th Amendments to the Constitution of the United States, in that he is deprived of property without due process of law and without compensation, when he is prevented from increasing the number of apartments in his store and apartment building in the central business district of the city.

(2) Whether a municipal zoning ordinance is not so unrelated to the public health, safety, comfort, morals and general welfare as to violate the 5th and 14th Amendments to the Constitution of the United States when it imposes height and intensity of use restrictions on a building designed and used for stores and apartments, not in a residential district, but in a business district.

(3) Whether an ordinance which prevents the use of the fourth floor of an existing store and apartment building in a business district is not void when no structural or exterior change is needed to make the fourth floor usable for additional apartments.

(4) Whether the owner is denied the equal protection of the laws when the ordinance denies him the right to build higher than three stories while other buildings in excess thereof are permitted in the same district.

(5) Whether the owner of property is not deprived of his constitutional rights to the unrestricted use of his property when the zoning ordinance limiting his use thereof is found by the trial court to have no reasonable relation to the public health, safety, comfort, morals or general welfare; where the benefit to the public is slight, if any,

and the damage to the owner is great; and where the reviewing court, without hearing or seeing the witnesses, sets aside the trial court's finding of facts.

Constitution, Statutes and Ordinances Involved.

The determination of the questions involved depends upon the 5th and 14th Amendments to the Constitution of the United States, and City of Highland Park Zoning Ordinances, which are set forth in detail in the Appendix, pp. 34-42.

STATEMENT OF THE CASE.

The building in question is located on the southeast corner of Sheridan Road and Park Avenue in Highland Park, Illinois. It fronts one hundred and twelve (112) feet on Sheridan Road and ninety (90) feet on Park Avenue. The first floor of the building contains retail shops, the second and third floors of the building each contain seven apartments. A mansard type roof covers the building. Two stairways and the elevator shaft extend from the basement to the attic. The building is located on the northeast boundaries of the central business district. (R. 3-15) On Sheridan Road, in the block north of the building, is located the American Legion Hall and also the Highland Park Woman's Club. In the block north of these buildings is a public school with an ornamental tower rising to a height higher than the building in question. Immediately to the east of the building in question is a two-story building occupied by doctors' offices and apartments. Beyond the doctors' building to the east is a residential district. Immediately to the south of plaintiffs' building is the parking lot of an undertaking establishment. Further to the south is a three-story building approximately the height of plaintiffs' building containing a drugstore on the first floor and doctors' offices on the second and third floors.

Retail stores and shops are on each side of Sheridan Road south of the building; one block south is Central Avenue running east and west; east on Central Avenue from its intersection with Sheridan Road are retail shops, a real estate office, the Alcyon Theatre, and the parking lot of the theatre. Central Avenue east of the parking lot is residential. The Huber parking lot is located across the street south from the Alcyon Theatre; on Central Avenue

in the block west from its intersection with Sheridan Road to St. Johns Avenue, are retail stores and shops and a bank; west of St. Johns are the North Shore Railroad tracks and west of the tracks is a municipal parking lot. To the west of the building is an old residence converted into business use, an auto bump shop, a furniture repair shop, an automobile sales room, and a filling station. Four blocks to the west and south is the city water tower. The west side of Sheridan Road north and across the street from the building in question is residential.

The building in question, which is of steel and masonry construction and considered fireproof, has an elevator running up to the fourth floor, rendering service to all floors. (R. 7-3) A photograph, Plaintiffs' Exhibit 2, which is reproduced here (page 7), clearly portrays the subject property. The building survey (R. 3-20) indicates a ground area of 13,310 square feet with the building covering a ground area of 7500 square feet.

A professional engineer, engaged in the business of city planning and zoning (R. 7-5, 6.) testified for plaintiffs that the fourth floor of the building was an integral part of the building and fully intended for use; that in architectural design all floors and materials were the same. (R. 7-7) It was this expert's opinion, inasmuch as rough plumbing had been originally extended to the fourth floor, that it was ready for installation of all sanitary facilities; heating ducts were installed, and all electric conduits were present; that it was entirely practical and feasible to complete the fourth floor into dwelling units as proposed by plaintiffs.

His testimony, further, was that the height of buildings, while a factor in zoning planning, was in reality a matter of light angles, that is, that a building could be constructed

Neg. #3627 Camera position on the North West Corner of Park ave., and Sheridan Road, Highland Park Ill. Camera facing South East. Photo made Oct. 31, 1953.

PLAINTIFF'S EXHIBIT 2

to a considerable height, provided free movement of air existed, and normal light angles of sunshine penetrated adjoining property (R. 7-6, 7.) He further testified the height of plaintiffs' building had no effect whatsoever on any adjoining property nor could the addition of seven apartments on the fourth floor, as proposed by plaintiffs, have any adverse effect, particularly since the external condition of the building would in no way be changed or modified (R. 3-31; R. 7-8).

His opinion, finally, was that the building use, as intended, would be completely compatible with the surrounding properties and area (R. 7); that in fact, the highest and best use of the building was with the completion of the fourth floor in connection with its present use, whereby plaintiffs would increase the availability of rental housing in Highland Park to answer a serious community need (R. 3, 7).

The complaint for declaratory judgment filed by plaintiffs alleged in paragraph 27 that the zoning ordinance of the City of Highland Park, if it deprived them of the use of the fourth floor of their buildings for additional apartments, "would contravene and violate the plaintiffs' rights under Sections 2 and 13 of Article II of the Constitution of the State of Illinois, and under the Fifth and Fourteenth Amendments to the Constitution of the United States." (R. 3). The answer, in paragraph 12, denied the allegation. (R. 3). The Circuit Court of Lake County found the issues for the plaintiffs but was reversed by the Supreme Court of Illinois which remanded with directions to dismiss the complaint. The petition for rehearing filed by the plaintiffs re-asserted (R. 22) the constitutional claims. The petition for rehearing was denied (R. 23).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision of the Supreme Court of Illinois in this case ignores the constitutional right of the owner of property to the use of the property without restriction by a municipal ordinance unless the restriction bears a reasonable relation to the public health, safety, morals, or general welfare. Where there is no such reasonable relation shown, the ordinance is violative of the protection of the 5th and 14th Amendments and is void.

The 1926 zoning ordinance (Section 6) of the respondent city permits in a local business district, among other uses, the following: apartment buildings, hotels and boarding and lodging houses; institutions other than correctional institutions; lodge halls; recreation buildings and structures; libraries; public museums; churches; temples; schools; colleges; clubs and hospitals. All are subject to the provision that "No building shall hereafter be erected or altered to exceed forty-five (45) feet in height or three (3) stories."

Subsequent to the passage of this 1926 ordinance, the then owners of the subject premises applied for and received, in about July, 1929, a permit to construct the building which is now on the premises. It conformed to the building provisions of the city code and was completed in its present state.

The building was erected in 1929. The immediate area in which the subject property is located was then classified for zoning purposes as a "local business district" and by the 1947 ordinance became part of the "central business district" (R. 3). Both ordinances limited the height of buildings within the district to 45 feet or three stories (R. 3-6), except that buildings owned by public or semi-public organizations such as hotels, hospitals, sanitariums,

schools, could be erected to a 60 foot height. By special permit under the 1947 ordinance "subject to such protective restrictions as it deems necessary", the height of a "hotel where the primary purpose is to provide seasonal or year-round living facilities" could be increased (R. 7-1, 2).

The building itself is variously described as a three, three-and one-half, and four story brick structure of steel and masonry, fireproof construction (R. 3-20; R. 7-3). There are six stores on the ground floor, seven apartments on the second floor and seven apartments on the third floor (R. 3-20). Steel and concrete staircases together with an elevator, provide access to and service for all floors including the fourth (R. 7-3) and the building does not exceed 45 feet in height (R. 7-26). The fourth floor, which was part of the building when built (R. 7-30) has a finished vestibule similar to those on the other floors (R. 3-23; R. 7-3, 7), and "is an integral part of the structure and fully intended to be used", in the uncontradicted words of plaintiffs' expert (R. 7-7), so that "it is entirely practical and feasible to finish off the fourth floor into dwelling units".

The record further discloses that the fourth floor, at the time the building was constructed, had been prepared for eventual use, in that the rough plumbing had been extended to that floor ready for the installation of sanitary and bathing facilities, heating ducts were present, ready to be connected, fireplaces were present, as well as all necessary electric conduits (R. 7). Plaintiffs' plans for completion reveal that, in the main, partitioning is all that is necessary to create the additional units, and no changes of any kind are contemplated for the outside of the building. (R. 3-24, 31; R. 7-8).

The record, furthermore, is clear that this is not a matter of adding another story. Plaintiffs simply propose, in

creating the additional units, to make a better and more logical use of existing, unused space (R. 7-8).

There is no dispute as to the immediate neighborhood. It is part of the central business district. On the same street and directly to the south of plaintiffs' building are a series of commercial establishments, shops, stores, undertaker's parlor, which, incidentally, has its own parking facilities (R. 3-22; R. 7-4, 8); one of the buildings, whose overall height is equal to that of plaintiffs' building (R. 3-20, 22) has doctors' offices. Across the street to the west are other commercial establishments and still further on Park Avenue to the west are commercial and manufacturing businesses. To the north is an American Legion Building, another houses the Highland Park Woman's Club and then follows a public school building (R. 3-21, 23). The immediate area outside the business district is a residential multi-family apartment district (R. 3-26), and defendant's witness conceded there was nothing about the area to give it the character of a single family residence (R. 7-10).

The professional engineer who testified for plaintiffs, whose qualifications are of the best, stated with reference to the height restrictions of the ordinance that while building height was certainly a factor in sound zoning (R. 3-29) its purpose was simply to assure to buildings adequate light and air; that the height of plaintiffs' building could have no adverse effect whatsoever upon any of the surrounding buildings (R. 3-31; R. 7-8).

Similarly, as to intensity of use, the testimony was to the effect that inasmuch as the proposed work contemplated only the use of presently unused space in a manner obviously fitted for that purpose, the addition of seven apartments on the fourth floor could hardly be such increase

in use intensity as to have any adverse effect upon the property itself or the immediate surrounding area. It was this expert's considered opinion that the ordinance limitations were unnecessarily restrictive and were not a reasonable exercise of space control (R. 3, 7).

In attempting to show an adverse effect upon sewer needs by the addition of the seven units, defendant offered the testimony of a professional engineer who had worked on the preparation of defendant's 1947 ordinance (R. 3). While testifying generally that the addition of seven units would increase the load on sewers (R. 3-59) he admitted that he had no knowledge as to whether the sewers were or were not adequate. Plaintiffs' testimony, on the other hand, offered by the person who had managed the building in question from 1946 through 1951, was to the effect that there had been no sewer difficulties (R. 3-38).

Defendant sought to justify the ordinance on the ground that the addition of the seven units would result in congestion on the streets. Considerable testimony was offered as to availability of parking facilities, both by plaintiffs (R. 3-21, 23, 37; R. 7-4, 10), and by defendant (R. 3-59, 71). Significantly, defendant's professional engineer conceded that even if the addition of one car for each family in the seven additional apartments were contemplated, the increase in movement in the area would be minimal (R. 7-10). Another of defendant's witnesses testified variously to having had a traffic count of 6,000 or 8,000 cars a day on Sheridan Road at the point of plaintiffs' building (R. 3-59, 61). He sought to show a pattern of congestion resulting from the addition of seven cars to that traffic count. We respectfully submit the finding of the trial judge to the effect "that there is no proof in the record from which the Court can infer or conclude that the proposed altera-

tions of the building would result in any appreciable increase in traffic hazard" (R. 3-17), is amply justified. See *Exchange National Bank* v. *County of Cook*, 6 Ill. (2) 419, 425; 129 N. E. 2d 1; and *Petropoulos* v. *City of Chicago*, 5 Ill. (2) 270, 276; 125 N. E. 2d 522.

It is clear from the record (R. 3-36), and the trial court so found (R. 3-74), that the value of plaintiffs' property would be substantially increased by the proposed additional units, whereas the gain to the public appears illusory or non-existent.

We should like to touch on one aspect of the ordinance to illustrate its discriminatory nature as to plaintiffs' property. The ordinance allows, by special permit, the structural alteration or extension of a hotel where the primary purpose is to provide seasonal or year-round living facilities and to increase its height; further, it provides that buildings such as hospitals, institutions or schools could be erected to a height of 60 feet, and churches to a height of 75 feet (R. 7-1, 2).

In the first place, standards for such special permits are not set forth in the ordinance. This has been held fatal. See *Welton* v. *Hamilton*, 344 Ill. 82, 93; 176 N. E. 333. Second, the increased effect of such structures upon sewage, traffic and the like is obvious. Yet that is permissible, whereas the addition of seven apartments to plaintiffs' building in existing space already provided for that purpose, is considered by the Court to be illegal. This discrimination, which would permit such a more intensive use as that of a hotel while holding illegal the proposed changes herein involved, highlights and emphasizes the unreasonableness of the ordinance.

We believe another observation to be in order. The trial judge alone heard the case. There is, admittedly, some

conflict in factual matters. The Judge heard and saw the witnesses. His findings (R. 3-16, 17; R. 7-3) have ample support in the record. We believe it appropriate to quote from a recent case wherein the Supreme Court of Illinois held invalid a rezoning from manufacturing to commercial which would prevent plaintiff from constructing a truck terminal. In *Northern Trust Co.* v. *City of Chicago*, 4 Ill. (2) 432, 123 N. E. 2d 330, the Court said (p. 333):

> "There is naturally a conflict of facts in the testimony in cases of this nature and the credibility of witnesses is therefore of great importance. We have often declared that the triers of fact are in a superior position to that of a court of review in such a situation. When the testimony is contradictory it is well established that in a trial without a jury, the determination of the credibility of witnesses and the weight to be accorded their testimony are matters for determination of the trial court and its findings will not be disturbed unless they are manifestly against the weight of the evidence."

(2) The decision of the Supreme Court of Illinois conflicts with its own decisions in other cases where on similar grounds the ordinances were held void as violative of the constitutional prohibition against taking property without due process of law.

A zoning ordinance, enacted in the exercise of a municipality's police power, must have a real and substantial relation to the public health, safety, morals and general welfare. It cannot fairly be said that this point is open to debate. In *Trust Company of Chicago* v. *City of Chicago*, 408 Ill. 91, 96 N. E. 2d 499, the Supreme Court of Illinois in reviewing the principles of zoning, said (p. 503):

> "While cities and villages have statutory authority for the enactment of zoning ordinances, nevertheless the governmental power so conferred to interfere by

zoning regulations with the rights of property owners is not unlimited, and such an ordinance, to be valid, must have a real and substantial relation to the public health, safety, morals or general welfare."

Both before and since this principle has been stated and restated. Thus, in *Pringle* v. *City of Chicago*, 404 Ill. 473, 89 N. E. 2d 365, on page 367, we find:

"The power to enact zoning ordinances, imposing reasonable restraint upon the use of private property, is established beyond question or doubt. The right to use property is subject to the proper exercise of police power, and under such power zoning ordinances are adopted. This police power, however, is restricted to enactments having substantial relation to the public health, safety, morals, or welfare. Ordinances which fail to meet this test are invalid. 'Whether an ordinance has any such relation is subject to review by the courts, and highly injurious restrictions lacking a basis in the public weal come within the constitutional inhibition against taking private property for public use without just compensation."

In *Hannifin Corp.* v. *City of Berwyn*, 1 Ill. (2) 28, 115 N. E. 2d 315, on page 318, the court said:

"Every owner has the right to use his property in his own way and for his own purposes, subject only to the restraint necessary to secure the common welfare. This privilege is both a liberty and a property right. (*Village of LaGrange* v. *Leitch*, 377 Ill. 99, 35 N.E. 2d 346) And as stated in *Irving Park Building Corp.* v. *City of Chicago*, 395 Ill. 138, 69 N.E. 2d 827, this right existed before the adoption of the constitution and is guaranteed by that instrument. This right, as above stated, is subject to a valid exercise of the police power, which exercise is valid only when it bears a reasonable relation to the public health, comfort, morals or general welfare. * * *"

Measured by this principle, the trial judge in the instant case found the ordinances in question invalid (R. 3). We will discuss the facts supporting this conclusion later.

The general scheme of a zoning ordinance may be valid, yet as applied to a particular property within the area zoned, the ordinance may be so arbitrary, unreasonable or discriminatory that it is invalid as to such property. It cannot fairly be said that this point is open to debate.

In *Pioneer Tr. & Sav. Bank* v. *Village of Oak Park,* 408 Ill. 458, 97 N. E. 2d 302, after reviewing the principles affecting the validity of zoning legislation generally, the court added, on page 305:

> "We further stated that a zoning ordinance may be valid in its general aspects, yet invalid as applied to a particular piece of property and a particular set of facts."

This principle has been stated and restated. In *Metropolitan Insurance Co.* v. *City of Chicago,* 402 Ill. 581, 84 N. E. 2d 825, on page 829, we find:

> "We have considered the validity of the amendatory zoning ordinance only insofar as it applies to the subject property. It may be valid in general, but invalid as applied to that property because arbitrary and unreasonable when tested by rules of law firmly established by the prior decisions of this court."

Recent affirmation is found in *Petropoulos* v. *City of Chicago,* 5 Ill. (2) 270, 125 N. E. 2d 522.

In the instant case plaintiffs urge that the original and amendatory ordinances, as they concern this property, are invalid. We have shown that they clearly violate plaintiffs' constitutional rights to due process and to compensation for property guaranteed by the 14th and 5th

Amendments to the U. S. Constitution and their equivalents in the Illinois Constitution. *Metropolitan Ins. Co.* v. *City of Chicago,* 402 Ill. 581, 84 N. E. 2d 825; *Schneider* v. *Board of Appeals,* 402 Ill. 536, 84 N. E. 2d 428; and *Pringle* v. *City of Chicago,* 404 Ill. 473, 89 N. E. 2d 365.

Where the relation to the public welfare is minor as compared to the harm done the property owner, the ordinance violates basic constitutional rights and will not be sustained.

We should like to refer to some more recent cases bearing upon the facts and legal principles involved in the instant case.

To illustrate, in the case of *Exchange National Bank* v. *County of Cook,* 6 Ill. (2) 419, 129 N. E. 2d 1, where defendant, as in the instant case, raised the question of traffic congestion to justify a residential zoning classification, the court said, on page 4:

> "Although zoning for the purpose of reducing traffic and avoiding congestion is a permissible exercise of the police power * * *, a zoning ordinance for such purposes must bear a reasonable relation to the public safety. In the numerous zoning cases (cases cited), this court has adhered to the doctrine which is succinctly stated in McQuillin on Municipal Corporations as follows: 'Where the public interest is nonexistent or insignificant and the opposing private interest will suffer great injury; the zoning measure is unreasonable, and, hence, is violative of due process and equal protection guarantees'. * * * When this rule is applied to the present case, it becomes manifest that whether the daily flow of vehicles on Cicero Avenue is 29,000 or 50,000, the increase in traffic which will be caused by the operation of the proposed truck terminal on

plaintiffs' property would be insignificant and minimal as to bear little relation to the public safety."

The similarity to the degree of traffic increase in our case, which might result from the addition of seven apartments in plaintiffs' existing building, is obvious. The trial judge found no proof of any appreciable increase in traffic hazard (R. 7-17).

Another case bearing a factual similarity to the instant case, in so far as an intended increase in an existing use is concerned, is that of *Pringle* v. *City of Chicago,* 404 Ill. 473, 89 N. E. 2d 365, heretofore cited herein. In that case, plaintiff sought to enjoin the enforcement of a zoning ordinance which prevented him from using his property as a two-family dwelling in a single-family zone. After reviewing the facts, which disclosed other and similar multiple family buildings nearby, the court said (p. 367):

> "The evidence establishes the proposed changes will not affect the exterior appearance of the building and that the improvements would appreciably enhance the value of appellants' property and would not depreciate the property of the other owners in the immediate neighborhood. * * *
>
> (p. 368) "The enforcement of the ordinance in this instance would result in no gain to the public when compared to the hardship it would impose upon the individual property of the appellants."

We submit that the evidence in the instant case leads to the same inescapable conclusion, as found by the trial judge (R. 7, 74-75).

Another recent case where height restrictions were declared void as being within the scope of the constitutional limitations hereinbefore referred to is *LaSalle National Bank* v. *City of Chicago,* 5 Ill. (2) 344, 125 N.E. 2d 609.

(3) The Supreme Court of Illinois has erroneously concluded that height and use restrictions are permissible in a business district to the same extent and degree as in a residence district.

One of the basic contentions of the plaintiffs in asserting the invalidity of the zoning ordinance was that the intensity of use provision was unconstitutional in that it deprived them of their property without due process of law and constituted a taking of property without compensation. The trial court shared that view and held that the ordinance was invalid. The Supreme Court of Illinois in its opinion has not answered the constitutional points which have been raised by the plaintiffs but has rather begged the question by saying that inasmuch as the statute permits intensity of land use to be governed by ordinance therefore the ordinance is valid.

We respectfully submit that this constitutes an erroneous interpretation of the applicable law and warrants a review by this court of the basic principles of constitutional law underlying the exercise of the police power in zoning cases. The mere fact that the statute says that intensity of land use may be provided for by ordinance cannot be taken to be a blanket authority for any kind of intensity of land use provisions. We have no quarrel with reasonable intensity of use provisions which are enacted to govern residential areas. The view that the building of a home in a residential area requires a certain amount of space per person is one with which we do not disagree. We respectfully urge, however, that the use provisions, when attempted to be applied to a business district, fail entirely to possess a justification in any way similar to that in a residential area. The very fact that hotels are not required to comply with such intensity of use provisions or hospitals

or churches or schools is a sufficient indication of the unreasonableness of attempting to apply intensity of use provisions except in residential areas. The close proximity to this building of professional offices and of business establishments, with the large number of people constantly coming and going, has been pointed out by witnesses in this case. The intensity of use provisions are not properly applicable to the use of business premises but are important only as to the residential use of premises. The inconsistency is plain. An undoubtedly strong case can be made out for enforcing provisions in residential areas which limit the number of people who may reside there but there is not a shred of evidence in this case which should be taken by this court as justification for limiting the number of people who may reside in a building in a business district. There can be no justification for a law which does not have a sound reason to support it and we respectfully urge that there is no reason apparent from this entire record which should be taken by this court to justify limiting the number of people who can reside in this building.

One of the justifications which the Illinois Court has adopted in its opinion as a support for the decision is that the commercial uses make heavy demand on public facilities such as the water mains, sewers and streets, and therefore restrictions upon intensity of use are no less necessary in central business areas than in wholly residential areas. We submit that it is not the people who live in the business area who create heavy demand upon these public facilities, but rather the people of the entire community who come to the business area in pursuit of the basic purpose for which this business area was constructed. People come to a business area to shop and for service and for a myriad of other needs, but they do not come to a business area to live. It is therefore quite obviously improper to attach to

a business area the same standards of occupancy use which are affixed to residential areas.

We recognize that ordinarily the wisdom of an ordinance is not for the courts but for the legislative authorities. We submit however, that in this case the testimony which the Court has recounted in its opinion is the very foundation for the conclusion which was arrived at by the trial court, that is, that there is no reasonable relation between the limitation of use contained in the ordinance and the public health, safety, morals, or welfare, and for that reason, the constitutional rights of the plaintiffs have been violated and the ordinance should have been declared illegal by the Illinois Supreme Court as it was by the trial court.

We respectfully submit that the Court's conclusion that no evidence was offered to prove that the application of the ordinance to the plaintiffs' property is arbitrary or capricious is not consistent with the facts which we have called to the Court's attention hereinabove. There was ample evidence, we submit, to show clearly that the application of the ordinance to the plaintiffs' property is arbitrary and capricious.

The Illinois Supreme Court states that if these plaintiffs were allowed to create the additional apartments by finishing off the fourth floor of their building it would be difficult to see how the limitations of the ordinance could fairly be enforced against any owner of property in the central business district. We do not dispute this statement, on the contrary we insist that the provision of the ordinance insofar as it applies to the subject property is illegal, and, while it is not an issue in this case, we do not hesitate to say that as a general proposition, intensity of use limitations are applicable only to properties in residential areas and should not be extended to business areas.

In *Welch* v. *Swasey*, 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567, this Court recognized that there was a proper distinction made between the height of buildings permitted by the ordinance in a business district and the lower height limitation in a residential district. Here, however, the ordinance discriminates between apartments in a business district and hotels and hospitals in the same business district. Both are equally places of habitation albeit for perhaps varying duration, but to the extent that in a business district the store and apartment building of plaintiffs cannot exceed three stories or 45 feet while a hotel or hospital is permitted to rise to sixty feet, presents a clear case of discrimination and unequal application of the law.

In *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 71 L. ed. 303, 47 S. Ct. 114, this Court held that a zoning ordinance was valid even though it excluded business uses from residential areas and apartments from single family areas but nowhere therein is there a justification for different treatment of similar uses in the same district. Also in *Ronda Realty Co.* v. *Lawton*, 414 Ill. 313, 111 N. E. 2d 310, the Illinois Supreme Court held invalid an ordinance which required off-street parking to be provided by an apartment house in an apartment district but did not require the same kind of facilities by a hotel in an apartment district. The court held that the ordinance discriminated against the plaintiff there and deprived it of the equal protection of the law. We submit that the same is true of the present case.

CONCLUSION.

For the reason that the ordinance of the respondent city violates the guarantees of equal protection of the law and due process we respectfully urge that this petition for a writ of certiorari be allowed.

Respectfully submitted,

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